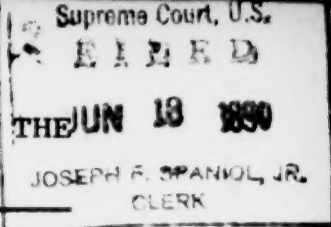


No. 89-1810

IN THE SUPREME COURT OF
UNITED STATES



OCTOBER TERM, 1989

WILLIAM R. SAUL,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
STATE CIVIL SERVICE COMMISSION;
and COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR AND INDUSTRY,
Respondents

BRIEF IN OPPOSITION

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Date: June 18, 1990

QUESTIONS PRESENTED

- I. Whether the due process clause requires a pre-deprivation hearing when a civil service applicant loses his veterans' preference?
- II. Whether the Pennsylvania court correctly dismissed the petitioner's complaint because he had not exhausted his administrative remedies?
- III. Whether, under Pennsylvania law, the petitioner is entitled to a state job?

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STATEMENT OF THE CASE

1. Pennsylvania, in selecting among applicants for state employment, grants a preference to veterans of the armed forces. Pa. Cons. Stat., tit. 51, §§ 7102-7104 (Purdon 1975). This case arises from petitioner's attempt to regain his "veterans' preference" and thus enhance his chances of getting a state job. He claims that the Pennsylvania Civil Service Commission wrongfully removed his veterans' preference and that, as a result, the Pennsylvania Department of Labor and Industry ["the Department"] wrongfully failed to hire him.

2. In the early 1980's, Saul took civil service examinations to obtain employment with the Commonwealth. (Pet. App. 6a, 37a.) He claimed to be a

veteran entitled to preference.¹
(Pet. App. 6a-7a.) The Civil Service Commission initially gave petitioner veterans' preference, but reconsidered and then revoked his preference in August 1981. (Pet. App. 7a, 8a, 37a.) The Commission notified the petitioner of its action (Pet. App. 8a), and he learned of it by December 1981 at the latest. (Ibid.)

Under Pennsylvania law, civil service applicants who are denied veterans' preference are entitled to a hearing before the Civil Service Commission, with an appeal as of right to the Pennsylvania Commonwealth Court

¹Petitioner's claim is based on the four months he spent as a cadet at the United States Air Force Academy. (Pet. App. 6a.)

and discretionary review by the Pennsylvania Supreme Court. Civil Service Act, Pa. Stat. Ann., tit. 72, §741.203(3) (Purdon Supp. 1990). Herskovitz v. State Civil Service Commission, 111 Pa. Cmwlth. Ct. 427, 534 A.2d 160 (1987). (Pet. App. 30a-31a, 38a-40a).

The petitioner, however, never sought a hearing before the Commission. (Pet. App. 30a). Rather, four years later, he filed a mandamus action in Commonwealth Court to obtain employment, back pay, and benefits. (Pet. App. 30a). At that point, his only claim was that he was entitled to veterans' preference and employment as a matter of state law. (Complaint, ¶¶14, 31; Amended Complaint).

3. Following a trial, a single judge of the Commonwealth Court dismissed the petitioner's action for failure to exhaust administrative remedies. (Pet. App. 32a-34a.) After this adverse ruling, the petitioner filed exceptions and supplemental requests for conclusions of law, which --for the first time-- alleged that the Commission's removal of veterans' preference without prior notice and a hearing violated his due process rights under the fourteenth amendment. (Petitioner's Supplemental Proposed Findings of Fact and Supplemental Conclusions of Law, p. 3.) The respondents moved to strike this supplemental document as untimely and as raising a new cause of action. (Respondents' Application To Strike, ¶¶10-13), and Commonwealth Court granted

their motion. (Pet. App. 44a-45a.)

Thereafter, a panel of the Commonwealth Court denied the petitioner's exceptions to the single judge's decision, without further addressing the due process claim. (Pet. App. 41a.) The Pennsylvania Supreme Court declined to review this order. (Pet. App. 42a.)

SUMMARY OF ARGUMENT

Petitioner's argument--that the Commission violated due process by failing to give him prior notice or a pre-deprivation hearing concerning the removal of his veterans' preference status--is not properly before this Court. The court below refused to consider this claim because it had not been timely or properly raised, and the Court thus lacks jurisdiction over it. Likewise, the Court does not have jurisdiction to review the petitioner's claims of error regarding interpretations of Pennsylvania law.

ARGUMENT

The Court Lacks Jurisdiction To Hear A Federal Question Not Properly Raised Nor Addressed By The State Court.

According to the petitioner, the questions presented in this case are: (1) whether the due process clause requires that he receive notice and a hearing before the removal of veterans' preference status; (2) whether Pennsylvania law required him to exhaust his administrative remedies before seeking judicial review of the removal of his preference status; and (3) whether Pennsylvania law required a state agency to employ him. (Pet. ii-iii). None of these questions, however, is properly before the Court. The first issue was neither timely nor properly raised in the court below, nor addressed by the state court, and the latter two issues do not present federal questions.

1. In the court below, the petitioner challenged the removal of his veterans' preference relying solely on state law. (Pet. App. 15a.) (Complaint; Amended Complaint.) The lower court dismissed the petitioner's mandamus action for failure to exhaust his administrative remedies. See Canonsburg General Hospital v. Department of Health, 492 Pa. 68, 73, 422 A.2d 141, 144 (1980). (Pet. App. 28a-32a, 38a-41a.) Only at this point--for the first time--did the petitioner claim that the Commission's notice to him and the lack of a pre-deprivation hearing was a violation of the fourteenth amendment. (Petitioner's Supplemental Proposed Findings of Fact and Supplemental Conclusions of Law, p. 3.) Commonwealth Court

subsequently refused to permit this untimely attempt to raise a new cause of action and never addressed the due process claim. (Pet. App. 44a-45a.)

It is well settled that under 28 U.S.C. §1257, a federal claim must be adequately presented in the state courts for the Supreme Court to have jurisdiction. Webb v. Webb, 451 U.S. 493, 496-97 (1981). The Court will not hear federal issues raised before it for the first time when reviewing state court decisions. Id. at 498-99. In fact, if the state court does not pass upon a federal question, as is the case here, it is presumed the lower court's action was for want of proper presentation before it. Id. at 495.

Clearly, the petitioner's efforts to raise this new federal claim three and one-half years after filing suit and, more importantly, after trying

and losing his case, was untimely, improper, and correctly rejected by the state court. Contrary to the petitioner's assertion, Pa.R.Civ.P. 1019(a), which requires parties to plead their facts concisely, does not authorize parties to raise new causes of action following the dismissal of their actions. Rather, Pennsylvania law, like federal law, requires parties to timely plead new causes of action. See Jones v. Cheltenham Township, 117 Pa. Cmwlth. Ct. 440, 444-45, 543 A.2d 1258, 1260 (1988). Because petitioner's federal claim was not first passed upon by the state court, the Court may not hear it.

2. As to the remaining issues presented by the petitioner, these issues concern only interpretations of state

law. Accordingly, the Court has no jurisdiction to review the state court's decision. Webb, 451 U.S. at 494-96 & n.1.

CONCLUSION

For the foregoing reasons, the respondents ask that the writ of certiorari be denied.

Respectfully submitted,

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